Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-781

OSGOOD D. HAMLIN, Petitioner,

versus

F. GREGORIE & SON, ESTHER GREGORIE, MARY ALLSTON GREGORIE, SARAH GREGORIE MILLER, FERDINAND GREGORIE, JR., ELIZABETH GREGORIE PENNERWILL, ANN GREGORIE GREENE, JULIAN WEAVER GRAY, ESTHER ROYALL GRAY SWAIN, SARAH WINDON GRAY MILLS, and JOHN EVERETT GRAY, Respondents.

Supplemental Appendix
~~PETITION FOR REHEARING IN THE COURT BELOW~~

FRED G. SCOTT, JR.
Post Office Box 70025
North Charleston, S.C.
29405

Attorney for the
Petitioner

Of Counsel:
JACK WHITE
129 Meeting Street
Charleston, S. C. 29401

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STATEMENT

Petitioner was served Respondents' Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of South Carolina on December 13, 1979. By error this brief contained as Appendix I a copy alleged to be Petitioner's Petition for Rehearing to the Supreme Court of South Carolina which

does not raise a question under the Constitution of the United States.

For the purpose of correcting this error Petitioner submits a copy of the filed Petition for Rehearing, denied by the South Carolina Supreme Court, which is the Petition relied upon by Petitioner. This Petition is labeled as if it were Appendix "C" to the original Petition for Writ of Certiorari.

The Constitutional question, deprivation of property without due process of law, is raised on Page A-34, infra, in Paragraph EIGHTH of the Petition for Rehearing.

APPENDIX

APPENDIX C: Petition for Rehearing

Your Appellant, OSGOOD D. HAMLIN, respectfully petitions this Honorable Court for a stay of remittitur and for a rehearing of this matter as provided under Section 2, Rule 17, of the Rules of this Court. Your Appellant would respectfully show that this Court has overlooked certain misapprehensions and oversights of the Trial Judge, whose Order of Summary Judgment this Court has affirmed, all as hereinafter set forth, all of which raise meritorious grounds for re-consideration by this Honorable Court and the remanding of this matter to the Circuit Court for a full hearing on the merits.

FIRST. The Trial Judge has misapprehended his duty under Rule 44 of the Circuit Court Rules. This rule charges him with sifting the factual averments and reasonable inferences deducible therefrom in a light most favorable to the Appellant Hamlin, seeking therefrom "genuine issue for trial". The averments of record available to the Trial Judge for sifting are limited to the following:

1) Complaint of Respondents.
2) Answer of Appellant Hamlin.
3) Deposition of Appellant Hamlin.
4) Affidavit of Appellant Hamlin.
5) Affidavit of a non-party, Attorney W. H. Brockinton.

The record is void of any support-

ing affidavits of Respondents, and their claims are founded and supported only by their naked petition.

SECOND. The Trial Judge has overlooked the following itemized uncontradicted averments of fact, together with reasonable inferences deducible therefrom, which when considered in a light most favorable to the Appellant, constitute "genuine issue for trial", supporting Appellant's position that the deed of Ferdinand Gregorie to Appellant Hamlin, dated January 31, 1961, and recorded in the R.M.C. Office for Charleston County in Book U-78, Page 66, was a conveyance in fee simple absolute.

1) As regards Deed (TR 31, 32 & 33):
   a) Deed is regular in form.
   b) Deed was prepared by grantor's attorney.
   c) Deed is properly executed.
   d) Valuable consideration is recited.
   e) Deed is witnessed by grantor's daughter and daughter-in-law.
   f) Deed is probated by grantor's attorney.
   g) Dower is renounced by wife of grantor.
   h) Dower renounced before attorney of grantor.
   i) Deed properly recorded.

2) As regards Agreement between F. Gregorie, Jr. and O. D. Hamlin

(TR 19-24):

a) Agreement on its face is an option to purchase conditioned upon fulfillment of certain specific conditions by optionee-Gregorie:
   i) Exercised with five (5) years.
   ii) Payment of $79,000.00.
   iii) Annual payments of $7,900.00.
   iv) Payment of taxes by optionee.
   v) Payment of insurance by optionee.

b) Option expired January 1966 (TR 198) and was never exercised by optionee Gregorie.

3) As regards undisputed allegations by Appellant-Hamlin:
   a) W. H. Brockinton was the only attorney involved in this transaction and prepared all documents and supervised their execution, including deed and option agreement.
   b) At no time did Mr. Brockinton allege to advise Appellant-Hamlin that deed and option agreement he prepared and supervised execution of would in effect constitute a mortgage (TR 198).

c) That purchase consideration of $79,000.00, participation in grantor's business and guarantee of future purchases of grantor's business (an additional $13,000.00) from Arkansas Fuel Oil Company was a full and fair consideration (TR 194).

d) That appellant-Hamlin was a relatively uneducated farmer and grantor-Gregorie was a sophisticated businessman. (TR 194).

e) There was no note or other evidence of any enforceable obligation of Gregorie to Hamlin. That there was no debt of Gregorie to Appellant Hamlin surviving conveyance, therefore, nothing to be secured by the mortgage. (TR 198).

f) That Appellant-Hamlin, at all times, intended the transaction to be an absolute conveyance in fee simple and so relied. (TR 194, 197 and 199).

g) Appellant-Hamlin has paid taxes and insurance on property, has farmed, sold timber, and has sold land without permission of Gregories. (TR 199).

h) Gregorie has never paid any taxes or insurance, disputed Hamlin's right to farm, sell timber or to sell land with-

out Gregorie's permission. (TR 199).

THIRD. The Trial Judge overlooked and misapprehended his duty to sift the averments of record and the reasonable inferences deducible therefrom, in a light most favorable to Appellant Hamlin, for genuine issues of trial, when he ignored averments of Hamlin specifically supporting that intention of the parties was that the deed in question was always intended to be a deed as follows:

1) The consideration of $79,000.00, guarantee of future purchases by Gregorie from Arkansas Fuel Oil Company and participation in the management of the Gregorie business was fair, full and adequate. (TR 194).
2) Intention of parties was conveyance in fee simple absolute. (TR 194, 196, and 199).
3) Negotiations for sale were made with approval of Ferdinand Gregorie and W. H. Brockinton, attorney for Gregorie. (TR 196).
4) Option Agreement was suggested by W. H. Brockinton, attorney for Gregorie, and was nothing more than an option. (TR 196 and 198).
5) There was no debt of Gregorie to Hamlin surviving the conveyance (TR 198).
6) Proceeds from sale of lots would have been applied to purchase by Gregorie, if Gregorie failed had exercised option, but Gregorie failed

to do so, and option expired in 1966. (TR 199).

7) Representations of W. H. Brockinton that Hamlin was not purchasing in fee simple absolute were false. (TR 199).

8) Hamlin has exercised a dominion of a true and lawful owner over the property since his purchase in 1961, paying all taxes, paying all insurance premiums, selling timber, selling land, and farming. (TR 199).

FOURTH. Trial Judge, considering the record at this stage is constituted only of averments, has overlooked the fact that there are no averments in the record by the Respondents, saving and excepting, the initial complaint. Gregorie has failed to affirmatively support Motion for Summary Judgment, either by affirmative affidavits of petitioners or by counter affidavits to Appellant Hamlin. Consequently, any averment by deposition or affidavit of Hamlin contra to allegations of the complaint of Gregorie must be considered, at this state, true and unrefuted. Consequently, there is no averment contra to Hamlin's affidavit and deposition to be relied upon by Judge Moore in the sifting of his facts to determine a genuine issue for trial. Rule 44 provides that an adverse party may not rest upon mere allegations or denial of his pleadings. At this state, it is apparent that it would be necessary for Gregorie to set forth, by affidavit, averments contra to those statements of fact by Hamlin which esta-

blished "genuine issue for trial". Affidavit of W. H. Brockinton, the only extra-pleading allegations in favor of Gregorie, is ambiguous and hedges by Brockinton's failure to set forth direct statements as to the nature of the transaction as follows:

1) Even though Brockinton prepared all documents, supervised this transaction from negotiation through execution, Brockinton states, "there was still no question, but that the property known as "OAKLAND" was simply being put in Hamlin's name as security for the monies being borrowed to pay off the indebtedness to Arkansas Fule". Yet, there is the glaring omission by Brockinton of any averment that the deed was intended to be a mortgage. Nor is there any statement that there was a note prepared or other evidence of an obligation by Gregorie to repay Hamlin. Brockinton vaguely speaks of an understanding of a security, yet admits preparing documents and supervising transaction with no documentary substantiation. (TR 191).

2) Although Brockinton states, "there was certainly never any understanding on deponent's part that "OAKLAND" was being sold to Hamlin, or that he was purchasing said property from the Gregorie family", the affidavit of

Brockinton is dramatically void of any reference to documents that would support this position, either official documents executed by parties, or notes, memoranda and correspondence in the files of Brockinton. Such averment must be suspect when Brockinton, himself, prepared the deed and acted as notary for the probate and the renunciation of dower. (TR 191).

3) Hamlin, by his affidavit, responds to all averments of Brockinton that might infer the deed in question was a mortgage, specifically denying the same and affirmatively avering the deed was originally intended to be, and always was, a deed. (TR 197 & 199).

FIFTH. The Court has overlooked that the Trial Judge has misapprehended that his duty, under Rule 44, is to be a weigher of the facts, rather than one of sifting the averments of record and reasonable inferences deducible therefrom, in a light most favorable to the Appellant. The Trial Judge has wrongfully acted as a judge of the facts in the following instances:

1) His Honor, at this state of proceeding, does not have the authority to find that the deed and the Memorandum of Agreement are part and parcel of the same

transaction. (TR 204).

2) His Honor, at this stage of proceeding, does not have the authority to conclude the existence of a debt surviving the conveyance when there is no showing of evidence of an enforceable debt, and where the direct unequivocal statement of Appellant, by affidavit, is that there was no surviving debt. (TR 206 & 207).

3) His Honor, at this stage of proceeding, does not have the authority to find no discussion between parties personally as to sale when there is direct averment by affidavit of Hamlin of negotiation between Hamlin, attorney for Gregorie, creditor for Gregorie, and approval by Gregorie as to sales negotiations. (TR 196).

4) His Honor, at this stage of proceeding, does not have the authority to find that the purchase consideration was grossly inadequate, where there is no direct testimony at all to support that finding. The only testimony as to value of the property is by Appellant Hamlin who avers that the consideration of $79,000.00, guarantee of future purchases, and participation in management of the Gregorie business is full and fair.

(TR 206).

5) His Honor, at this stage of proceeding, does not have the authority to read terms of the option agreement in any way but as literally stated. The plain and literal meaning of the option agreement is that the grantor, Gregorie, had the option to purchase "OAKLAND" from the grantor, Hamlin, by fulfilling certain specific terms. (TR 206).

SIXTH. The Court has overlooked that the Trial Judge has overlooked and misapprehended the ruling law that a deed, regular in form, will not be found to be a mortgage, unless it is proven by clear, definite and convincing evidence that the original intention of the parties was that it be a mortgage. At this stage of the legal process, i.e., consideration of summary judgment, there is no evidence, only allegations and averments of fact. The only relevant averment of the Plaintiffs, whose burden it is to show by clear, definite and convincing evidence that the deed in question was originally intended to be a mortgage, is to be found in Paragraph EIGHTH of the complaint and reads as follows:

> "The plaintiffs are informed and believe that on January 31, 1961, Ferdinand Gregorie and Osgood D. Hamlin, both clearly intended that the instrument

> dated January 31, 1961, conveying property known as "OAKLAND" from Ferdinand Gregorie to Osgood D. Hamlin, was in fact a mortgage instrument or an instrument intended to secure Osgood D. Hamlin for the repayment to him of the debts of Ferdinand Gregorie." (TR 5).

Ferdinand Gregorie died in 1968, and the record is void of any cooperating allegation by Ferdinand Gregorie made prior to his death. The other party to the deed, Appellant Hamlin, specifically denies in his answer this allegation of Gregorie. (TR 15). Hamlin further, by affidavit, clearly and equivocally avers as follows:

> "It was the intention of deponent (Hamlin) at all times, that this consideration was for the conveyance to deponent (Hamlin) by Ferdinand Gregorie of "OAKLAND", in fee simple absolute. Furthermore, it was always the expressed intention of Ferdinand Gregorie, his son Ferdinand Gregorie, Jr., acting as his agent, and his attorney W. H. Brockinton, that this conveyance was in fee simple absolute, and on information and belief, such was the actual intention of Ferdinand Gregorie, Ferdinand Gregorie, Jr., and W. H. Brockinton, all on which deponent relied." (TR 194)

and

> "Deponent advised W. H. Brockinton and Ferd Gregorie that if Gregorie desired, he (Hamlin) would purchase "OAKLAND" for an amount agreed upon, pay debt to Arkansas Fuel Oil Company, participate in operation of the business, and finance the business. W. H. Brockinton, attorney for the Gregories, asked Hamlin if he would enter into an option agreement with Ferd Gregorie, whereby deponent would sell to Ferd Gregorie "OAKLAND", if exercised in one (1) year. Later it was requested the option period be extended for five (5) years. This was agreeable to deponent (Hamlin) and to Ferdinand Gregorie." (TR 196).

and

> "At all times, it was made clear by deponent (Hamlin) that the purchase of "OAKLAND" was to be absolute. This was particularly made clear to W. H. Brockinton, attorney for the Gregories, and to Ferd Gregorie." (TR 197).

These averments of Hamlin raise a "genuine issue of fact" which pre-empt

summary judgment and raise Hamlin's right to trial.

SEVENTH. The Court has overlooked the fact that affirmation of the Order of the Trial Judge deprives the parties hereto, and any other persons similarly situate, of the right to freedom of contract, effectively ruling that any agreement granting an option to a grantor to repurchase property, conveyed at the time of conveyance, is by law a mortgage, and consequently, no agreement between a grantor and a grantee providing for a future repurchase option by grantee to the grantor can be relied upon to be legal in the State of South Carolina, whether said transaction might be entered into now or eighteen (18) years ago.

EIGHTH. The Court has overlooked the fact that the Trial Judge has misapprehended his duty, ruling on a Motion for Summary Judgment and establishing himself as a "Trier of Fact", where the actual facts alleged by the Appellant Hamlin and the reasonable inferences deducible therefrom in a light most favorable to said Appellant, raise a "genuine issue of fact" to be determined by trial. The Trial Judge has, in effect, weighed the facts contrary to his authority and contrary to Hamlin's right to due process and equal protection of law. Affirmation of the Order of the Trial Judge effectively deprives Appellant Hamlin of his property without due process of law and without equal protection of the law as guaranteed to Hamlin

under the Constitutions of the State of South Carolina and the United States of America.

WHEREFORE, having shown that the record when sifted, yields averments and reasonable inferences deducible therefrom, which if supported by competent evidence at trial, raise "genuine issues for trial", your Petitioner prays that remittitur be stayed and that directive of this Court of July 24, 1979 be withdrawn and this matter be remanded for trial.

Respectfully submitted,

Jack White, Esquire
Fred G. Scott, Jr., Esquire
Lewis, Lewis & Robinson

Attorneys for Appellant

By: s/Fred G. Scott, Jr.

August 3, 1979.

CERTIFICATE OF COUNSEL

The undersigned attorney at law certifies that he is not concerned in this matter and that there is merit in the grounds set forth in this Petition for Rehearing.

s/George E. Campsen

August 3, 1979.